SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-388

HALCON INTERNATIONAL, INC.,
Petitioner,

vs.

MONSANTO AUSTRALIA LIMITED,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE ISSUE.

We submit the appellant has misstated the issue in this case.

The single issue is whether in the statutory action under the Federal Arbitration Act (9 U. S. C. §§ 1 *et seq.*) in which there is no dispute as to the making of the agreement to arbitrate or the failure of the respondent-appellant to comply therewith, the federal court may consider the alleged defense of laches in the initial assertion of the claim in dispute, or whether that issue is for determination by the arbitrators.

We submit the answer is found in the clear and unambiguous language of the statute itself (9 U. S. C. § 4), as construed by this Court in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* (1967), 388 U. S. 395. That case presents no issue of *sub silentio* overrulings of pre-*Prima Paint* cases in the Second Circuit; the Second Circuit itself has distinguished or expressly overruled those earlier opinions in *Trafalgar Shipping Co.* v. *International Milling Co.* (2 Cir., 1968), 401 F. 2d 568, in an opinion which squarely accords with the opinions of both lower courts here. There is no conflict between the holding below and *Prima Paint*, except with Mr. Justice Black's dissenting opinion; a different statute is involved in the labor arbitration cases; and the holding below follows the plain meaning of the Arbitration Act and the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

ARGUMENT.

I.

THE DECISION BELOW IS IN COMPLETE ACCORD WITH THE STATUTE AND WITH THIS COURT'S OPINION IN PRIMA PAINT.

The statute here involved is 9 U. S. C. § 4 which so far as relevant provides:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* (1967), 388 U. S. 395, at 402, this Court defined "the central issue in this case", one upon which courts of appeal had differed as:

> "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators."

This Court readily found the answer in the statute, saying (pp. 403-4):

> "With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce,' we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration

> agreement. Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

This construction of the statute does not "render arbitration agreements more enforceable than other agreements"; it simply delineates which tribunal shall decide which issues.

Petitioner's interpretation of *Prima Paint* is that of the thesis of Mr. Justice Black's *dissenting* opinion in *Prima Paint*, 388 U. S. 407 *et seq.* The majority of the Court found Mr. Justice Black's review of the legislative history (*ibid.*, pp. 412-23) unpersuasive. The majority of the Court correctly read the "savings clause" in § 2 of the Act as limiting the court's consideration of equitable defenses to those

justifying revocation of the arbitration provision, not revocation of the entire contract. 388 U. S. 404, n. 12; cf. the dissent, *ibid.*, pp. 416-22.

Petitioner's construction of *Prima Paint* was rejected by the Court of Appeals for the Second Circuit in *Trafalgar Shipping Co.* v. *International Milling Co.* (1968), 2 Cir., 401 F. 2d 568 and is conclusively refuted by this Court's denial of certiorari to review the decision of the New York Court of Appeals in *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.* (1970), 25 N. Y. 2d 576, 255 N. E. 2d 774, *cert. den.* June 1, 1970, ... U. S. ....., 90 S. Ct. 1844, 26 L. Ed. 2d 272.

In *Trafalgar*, the petitioner's vessel was damaged on February 24, 1961. In November, 1965 Trafalgar notified International of its claim. In August, 1966, Trafalgar demanded arbitration. The Court said (p. 570):

> "In August, 1966, Trafalgar demanded that the dispute be submitted to arbitration; it gave notice of its selection of an arbitrator and requested International to appoint one in accordance with the arbitration agreement but International refused.
>
> "In May, 1967, Trafalgar brought this suit in the district court to compel arbitration, 9 U. S. C. § 4. International defended the action on the ground that Trafalgar's right to arbitrate was barred by laches. In support of this it submitted affidavits which purported to show that Trafalgar's long delay in asserting its claim had left International powerless to defend itself before the arbitrators, owing to the death or disappearance of witnesses to the grounding, the loss of evidence to show the cause of the damage to the vessel, and other difficulties."

Thus, the court was (p. 571):

> "directly confronted with the question whether laches is for the court or the arbitrators",

the identical question now before this court and the court answered, saying (p. 57):

> "In answering it we consider the opinion in *Reconstruction Finance*, the purpose of the laches doctrine, and the objectives of the federal Arbitration Act, 9 U. S. C. §§ 1-13. *In our view, all of these approaches lead to the conclusion that the issue of laches as it presents itself in this case is for the arbitrators to decide.*" (Emphasis supplied.)

The court then considered "the purpose of laches," saying (p. 571):

> "The purpose of laches is simply to relieve a decision-making body of the duty to resolve, and to prevent one party from having to prove, issues as to which the relevant evidence has been lost due to the delay of the other party. The only issues which the court is authorized to consider on a motion to compel arbitration are ones which pertain to 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same,' 9 U. S. C. § 4; Prima Paint Corp. v. Flood & Conklin, *supra*, 388 U. S. at 403-404, 87 S. Ct. 1801. If one of these issues is disputed before the court, and if one party claims that its ability to present proof in relation thereto has been prejudiced through the delay of the other, the court may consider whether it is fair to permit the dilatory party even to invoke its processes under the Act."

The court concluded (p. 572):

> "Because in the present case, none of the issues which we have mentioned is in dispute, there is no question of laches which the court should decide.
>
> "We hold that on a motion to compel arbitration a district court may consider only claims of laches which relate to issues which the court must decide. The arbitrators must resolve any such claims which relate to issues which the parties have agreed to submit to arbitration."

That the Second Circuit fully recognizes the import of *Prima Paint* is seen in its affirmative, *per curiam,* upon oral argument, in *Sears Roebuck & Co.* v. *Glenwal Co.* (2 Cir., 1971), 442 F. 2d 1350 upon the opinion below, 325 F. Supp. 86 which held (p. 90):

> "It is beyond question that the parties agreed to submit disputes arising under the construction contract to arbitration, and since no claim is made, nor could any be advanced upon the facts here asserted, that the arbitration clause was induced by fraud, the matter must go to arbitration." (citing *Prima Paint*)

See also, *Ocean Industries Inc.* v. *Soros Associates* (D. C., N. Y.) 328 F. Supp. 944.

In *Dow Chemical,* the New York court construed *Prima Paint* as holding that under the Federal Arbitration Act (255 N. E. 2d at 776):

> "under that statute, once the arbitration clause itself is found to be valid, all questions, including that having to do with a time limitation, must be left to the arbitrators for ultimate decision."

Holding the federal act applicable, since the charter party was a maritime contract, the court held the petitioner could not invoke the New York rule that the issue of time limitations was for the court, nor bring an action in the state court to avoid arbitration. This Court denied certiorari. 90 S. Ct. 1844, 26 L. Ed. 2d 272. Since the issue was clear-cut, this Court's ruling is squarely *contra* to Petitioner's interpretation of *Prima Paint.*

II.

THERE IS NO TRUE CONFLICT BETWEEN THE DECISION BELOW AND IRONALL AND FLAIR BUILDERS.

In its briefs below, petitioner here relied upon *Amalgamated Clothing Workers* v. *Ironall Factories Co.* (6 Cir., 1967), 386 F. 2d 586, and upon the oral argument cited the recent decision of the court below in *Operating Engineers* v. *Flair Builders, Inc.* (7 Cir., 1971), 440 F. 2d 557. In its petition here, petitioner asserts (p. 3) that the decision below creates "an irreconcilable conflict with the unanimous federal circuit court decisions" in labor arbitration cases. We submit there is no such conflict.

In the first place, both *Ironall* and *Flair Builders* were actions brought under § 301 of the Labor Management Relations Act (29 U. S. C. § 185), which contains no limitations upon the issues which the district court may consider, such as are contained in § 2 and § 4 of the United States Arbitration Act (9 U. S. C. §§ 2, 4). Neither opinion refers in any way to the Arbitration Act, or considers *Prima Paint. Ironall* obviously misinterprets *Reconstruction Finance Corp.* v. *Harrison & Crossfield* (2 Cir., 1953) 204 F. 2d 366 and *World Brilliance Corp.* v. *Bethlehem Steel Co.* (2d Cir., 1965), 342 F. 2d 362 as those cases were later read by the court in *Trafalgar. Flair Builders* considers none of the commercial arbitration cases. No "irreconcilable conflict" is presented by these decisions.

Secondly, *Ironall* and *Flair Builders* do not stand for any body of "unanimous federal circuit court decisions in actions to enforce labor arbitration contracts that the issue of laches is for the court"(Pet., p. 3) Both of these cases are in conflict with this Court's holding in *John Wiley & Sons* v. *Livingston* (1964), 376 U. S. 543 that that issue should be for the arbitrator, not the court. *Ironall* is in

conflict with the Sixth Circuit's later decision in *Chambers* v. *Beaunit Corp.* (6 Cir., 1968), 404 F. 2d 128, *Flair Builders* with the earlier decision of the Seventh Circuit, *en banc,* in *Local Union* v. *Illinois Power Co.* (7 Cir., 1966), 357 F. 2d 916; both are in conflict with the Second Court's decision in *Rochester Telephone Co.* v. *Communications Workers,* 2 Cir. (1965), 340 F. 2d 237, the Fourth Circuit's decision in *Porter Co.* v. *Local 37,* 4 Cir. (1968), 400 F. 2d 691, the Eighth Circuit's decision in *Local 148* v. *Interco, Inc.,* 3 Cir. (1969), 415 F. 2d 1208, and the Ninth Circuit's decision in *Bealmer* v. *Texaco Inc.,* 9 Cir. (1970), 427 F. 2d 885.

Finally, if we accept Chief Judge Swygert's distinction between *extrinsic* and *intrinsic* untimeliness as did Judge Sprecher below (Pet. App. A, p. 13a) the conclusion which he reached (Pet. App. A, p. 14a) is inescapable:

> "As in *Prima Paint,* the entire contract, and not merely the arbitration clause, is in issue. The question of laches is intrinsic to the whole contract. Whether there was any inexcusable, unreasonable and prejudicial delay requires a fact-finding review of the entire contract and of all of the transactions occurring under it. It must be determined how the question of timeliness was affected by the conceded failure to meet the guarantee, by the efforts of the parties to solve the resulting problems, by the period of discussions between the parties, by the closing of the plant, by the changing conditions and circumstances, by the importance of the knowledge of the witness who moved to Australia, and by a host of other problems requiring a certain amount of expertise by the factfinders."

Trafalgar, supra, squarely holds that such a defense of laches is for the arbitrators, not the court. There is no "conflict" here to warrant review by certiorari.

III.

THE DECISION BELOW HAS NO "ADVERSE AND UNFAIR IMPACT ON PARTIES TO ALL EXISTING ARBITRATION CONTRACTS SUBJECT TO THE ACT."

The only "impact" of the decision below is upon the parties to this action. The only "impact" upon Halcon, the petitioner here, is that it must present to the arbitrators the evidence of its defense of laches which it otherwise had proposed to present to the district court. Irresponsible charges of "the destruction or loss of evidence crucial to a defense in the arbitration" (Pet. p. 16 will not suffice; the defense must be proved. Petitioner is not being "deprived" of a defense which it could have proved in the district court. As the court pointed out in *Trafalgar* (p. 572):

> "Moreover, in our view, laches is not a technical legal issue which only a judge is competent to decide. Rather, in the often esoteric field of commercial dealings, and in admiralty, it would seem that the severity of prejudice suffered through delay, and the reasonableness of excuses offered by the dilatory party, the elements of laches, might be resolved better where resort is had to the expertise of the arbitrators. Cf., Cohen & Drayton, *supra* at 281."

In *Prima Paint* this Court referred to

> "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." (p. 404)

and held:

> "Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power. The question which Prima Paint requested

> the District Court to adjudicate preliminarily to allowing arbitration to proceed is one not intended by Congress to delay the granting of a § 3 stay."

The decision below fulfills the "unmistakably clear congressional purpose" not to delay the arbitration to which the parties had agreed. The petition for certiorari should be promptly denied so that the arbitration, delayed almost two years by petitioner's recalcitrance, may proceed promptly.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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